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Nos. 94-1566 and 94-1990

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC., PETITIONER

v.

BELL ATLANTIC CORPORATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

DREW S. DAYS, III
Solicitor General

GEORGE J. PHILLIPS
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

Federal Communications Commission
Washington, D.C. 20554

DOUGLAS N. LETTER
MARK B. STERN
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether 47 U.S.C. 533(b), which bars local telephone companies from directly providing video programming to subscribers in their telephone service areas, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners in No. 94-1893, defendants-appellants below, are the United States, the Federal Communications Commission, and Janet Reno, in her official capacity as the Attorney General of the United States. Petitioner in No. 94-1900, an intervenor-defendant and also an appellant below, is the National Cable Television Association, Inc. Respondents, plaintiffs-appellees below, are The Chesapeake and Potomac Telephone Company of Virginia, Bell Atlantic Video Services Company, Bell Atlantic Corporation, Chesapeake and Potomac Telephone Company, C & P Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Bell Telephone Company of Pennsylvania, and New Jersey Bell Telephone Company.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Introduction and summary of argument	16
Argument:	
I. Section 533(b) does not require strict scrutiny	19
II. Section 533(b) meets the requirements of intermediate scrutiny	24
A. Section 533(b) furthers significant governmental interests	24
B. Section 533(b) is narrowly tailored	27
C. LECs have ample alternative channels of communication	37
III. The FCC's Third Report and Order eliminates any doubts about the constitutionality of Section 533(b)	39
Conclusion	43

TABLE OF AUTHORITIES

Cases:

Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, In re, 77 F.C.C.2d 384 (1980), modified in part on reconsideration, 84 F.C.C.2d 50 (1980), 88 F.C.C.2d 512 (1981), aff'd *sub nom. Computer & Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983)	4, 6
American Scholastic TV Programming Foundation v. *FCC*, 46 F.3d 1173 (D.C. Cir. 1995)	30

Cases—Continued: Page

Ameritech Corp. v. *United States*, 867 F. Supp. 721 (N.D. Ill. 1994), appeal pending, No. 95-1223 (7th Cir.) 14
Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Telephone Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971) 5, 6, 7, 20, 35
BellSouth Corp. v. *United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), appeal pending, No. 94-7036 (11th Cir.) 14
Board of Trustees v. *Fox*, 492 U.S. 469 (1989) 28
Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) 29
California v. *FCC*:
905 F.2d 1217 (9th Cir. 1990) 4, 31
4 F.3d 1505 (9th Cir. 1993) 5
39 F.3d 919 (9th Cir. 1994) 5, 37
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 21
City of Renton v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986) 22, 29
Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 23, 28, 38
Delaware, L. & W.R.R. v. *United States*, 231 U.S. 363 (1913) 6
FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) 3, 20, 25
Frisby v. *Schultz*, 487 U.S. 474 (1988) 23, 24
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) 38
Illinois Bell Telephone Co. v. *FCC*, 740 F.2d 465 (7th Cir. 1984) 4
Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report, In re, 9 F.C.C. Rcd 7442 (1994) 30
Jean v. *Nelson*, 472 U.S. 846 (1985) 22

Cases—Continued: Page

Members of City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 22, 23, 31, 41
NYNEX Corp. v. *United States*, No. 93-323-P-C (D. Me. Dec. 8, 1994), appeal pending, No. 95-1183 (1st Cir.) 14
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 3
National Cable Television Ass'n v. *FCC*, 33 F.3d 66 (D.C. Cir. 1994) 9
National Rural Telecom Ass'n v. *FCC*, 988 F.2d 174 (D.C. Cir. 1993) 4, 32
New York Tel. Co., In re:
5 F.C.C. Rcd 866 (1990) 34
5 F.C.C. Rcd 5892 (1990) 34
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) 29
Pacific Telesis Group v. *United States*, 48 F.3d 1106 (9th Cir. 1994) 14
Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, Report and Order, In re, 95 F.C.C.2d 1117 (1983) 4, 6
Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 21
San Francisco Arts & Athletics, Inc. v. *United States Olympic Comm.*, 483 U.S. 522 (1987) 28
Southern New England Telephone Co. v. *United States*, No. 3:94-CV-80 (DJS) (D. Conn. Apr. 27, 1995), appeal pending, No. 95-6137 (2d Cir.) 14
Southwestern Bell Corp. v. *FCC*, 896 F.2d 1378 (D.C. Cir. 1990) 4
Southwestern Bell Corp. v. *United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995), appeal pending, No. 95-10478 (5th Cir.) 14
Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, First Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, In re, 7 F.C.C. Rcd 300 (1991) 9

Cases—Continued: Page

Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Inquiry and Notice of Proposed Rulemaking, In re, 3 F.C.C. Rcd 5849 (1988) 8, 26, 27
Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Notice of Inquiry, In re, 2 F.C.C. Rcd 5092 (1987) 8
Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, In re, 7 F.C.C. Rcd 5781 (1992), modified in part on reconsideration, 10 F.C.C. Rcd 244 (1994) 9, 10, 21, 22, 30, 32, 42
Turner Broadcasting System v. *FCC*, 114 S. Ct. 2445 (1994) .....*passim*
United States v. *American Tel. & Tel. Co.*:
524 F. Supp. 1336 (D.D.C. 1981) 4, 6, 25
552 F. Supp. 131 (D.D.C. 1982), aff'd mem. *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) 5-6, 25
United States v. *O'Brien*, 391 U.S. 367 (1968).... 19, 23
United States v. *Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949), aff'd mem. *sub nom. Loew's, Inc.* v. *United States*, 339 U.S. 974 (1950) 3
United States v. *Salerno*, 481 U.S. 739 (1987) 42
United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) 25
United States v. *Western Elec. Co.*:
900 F.2d 283 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990) 4, 31
993 F.2d 1572 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993) 32
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) 14-15, 40, 41
United States Telephone Ass'n v. *United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995), appeal pending, No. 95-1175 (D.C. Cir.) 14

Cases—Continued: Page

US West, Inc. v. *United States*, 48 F.3d 1092 (9th Cir. 1994) 14
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 11, 19, 20, 22, 23, 24, 28, 30, 37

Constitution, statutes and regulation:

U.S. Const. Amend. I 2, 14, 19, 28, 38, 39, 41
Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.* 25
Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 2
§ 2, 98 Stat. 2785 2
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 10
§ 2(a)(6), 106 Stat. 1461 10
Interstate Commerce Act, 49 U.S.C. 10746 6
Newspaper Preservation Act, 15 U.S.C. 1801-1804 3
Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.*:
15 U.S.C. 79a(a) 25
15 U.S.C. 79a(b) 25
47 U.S.C. 522(19) (Supp. V 1993) 20
47 U.S.C. 531 3
47 U.S.C. 532 (1988 & Supp. V 1993) 3, 30
47 U.S.C. 533 (1988 & Supp. V 1993) 8
47 U.S.C. 533(a)(1) (1988 & Supp. V 1993) 3
47 U.S.C. 533(a)(2) (Supp. V 1993) 10
47 U.S.C. 533(b) ..... *passim*
47 U.S.C. 533(b)(1) 7
47 U.S.C. 533(b)(3) 8
47 U.S.C. 533(b)(4) 8, 14, 15, 31, 39, 40, 41
47 U.S.C. 534(a) (Supp. V 1993) 30
47 U.S.C. 534(b) (Supp. V 1993) 3
47 U.S.C. 535(b) (Supp. V 1993) 3
47 U.S.C. 541(a)(1) (Supp. V 1993) 10
47 U.S.C. 543 (Supp. V 1993) 10
47 C.F.R. 64.601 (1971) 6

Miscellaneous: Page

Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 Am. Econ. Rev. 1052 (1962) 4

C. Edwin Baker, *Merging Phone and Cable*, 17 Hastings Comm. & Ent. L.J. 97 (1994) 26, 27

Cable-Instructional TV and S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 2d Sess. (1992) 10, 33

Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 2d Sess. (1990) 33

Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991) 10, 33, 34

Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) 8, 33

Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. (1990) 33

Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 2d Sess. (1990) 8, 33, 34

138 Cong. Rec. (1992):

p. H6489 (daily ed. July 23) 10

p. H6492 (daily ed. July 23) 10

p. H8671 (daily ed. Sept. 17) 10

p. H8673 (daily ed. Sept. 17) 10

p. S14,225 (daily ed. Sept. 21) 10

p. S14,237 (daily ed. Sept. 21) 10

Miscellaneous—Continued: Page

pp. S14,246-S14,247 (daily ed. Sept. 21) 10
p. S14,250 (daily ed. Sept. 21) 10
pp. S14,255-S14,256 (daily ed. Sept. 21) 10
p. S16,663 (daily ed. Oct. 5) 10
pp. S16,665-S16,666 (daily ed. Oct. 5) 10

141 Cong. Rec. (1995):

pp. H8436-H8438 (daily ed. Aug. 4) 16
p. H8437 (daily ed. Aug. 4) 16
p. H8438 (daily ed. Aug. 4) 16
p. S8570 (daily ed. June 16) 16
p. S8577 (daily ed. June 16) 16

General Accounting Office, *Telecommunications: FCC's Oversight Efforts to Control Cross-Subsidization* (Feb. 1993) 4, 31

General Accounting Office: *Telephone Communications: Controlling Cross-Subsidy Between Regulated and Competitive Services* (Oct. 1987) 4, 5, 31, 33

H.R. 1555, 104th Cong., 1st Sess. (1995) 16

H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) 3, 8, 20, 21, 25, 30, 33

2 Alfred E. Kahn, *The Economics of Regulation* (1988) 4

Office of Plans and Policy, *FCC Policy on Cable Ownership: A Staff Report* (Nov. 1981) 7, 35, 36

S. 652, 104th Cong., 1st Sess. (1995) 16

S. Rep. No. 456, 101st Cong., 2d Sess. (1990) 11, 34

S. Rep. No. 92, 102d Cong., 1st Sess. (1991) 11, 34

Statement of Assistant Attorney General Anne K. Bingaman Before the Senate Commerce Committee (Mar. 2, 1995) 32

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 42 F.3d 181.[1] The opinion of the

[1] "Pet. App." refers to the appendix to the petition in No. 94-1893. "Pet. Supp. Br." refers to the supplemental brief in support of the petition in No. 94-1893. "Pet. Supp. App." refers to the appendix to that supplemental brief. "Resp." refers to the response to the petitions for a writ of certiorari. "J.A." refers to the joint appendix.

district court (Pet. App. 53a-108a) is reported at 830 F. Supp. 909. The Federal Communications Commission's Third Report and Order (Pet. Supp. App. 1a-21a), concerning the statutory provision for waivers of the cross-ownership bar, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. Petitions for rehearing were denied on January 18, 1995. Pet. App. 109a-112a. On March 24, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 18, 1995. The petitions for a writ of certiorari were filed on May 18, 1995, and were granted on June 26, 1995. J.A. 387, 388. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The text of 47 U.S.C. 533(b) is set forth at Pet. App. 167a-168a.

STATEMENT

1. This case involves a First Amendment challenge to 47 U.S.C. 533(b), a regulation of the market for cable television services that bars local telephone companies (local exchange carriers or LECs) from directly providing video programming, by means of a cable system, to subscribers in their telephone service areas. Section 533(b) was enacted as part of Congress's comprehensive regulation of the cable industry in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Cable Act or 1984 Cable Act); see § 2, 98 Stat. 2785. It is similar to another cross-ownership rule, enacted at the same time, that prohibits local television broadcast stations from owning cable systems in their

service areas. See 47 U.S.C. 533(a)(1) (1988 & Supp. V 1993). It also stands in a long line of congressional and administrative initiatives to promote diversity in media outlets.[2]

Section 533(b) addresses the special potential for anti-competitive conduct by LECs, which are generally regulated monopolists within their common carrier telephone service areas, in less regulated markets such as the market for cable services. LECs' telephone operations are, in general, subject at the state level to rate regulation based on a return on capital and recovery of costs. If LECs entered the cable market, they would have an incentive to allocate the costs of their cable services to their monopoly telephone operations, and to have regulators set higher telephone rates based on those shifted costs. Such cost-shifting would allow LECs to impose their cable costs on captive telephone ratepayers without sacrificing telephone service market share, and to subsidize their affiliated cable entities with monopoly telephone profits. Telephone consumers would suffer higher rates based on distorted costs, and businesses competing with LECs' affiliated cable entities might wither under

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[2] See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding restrictions on cross-ownership of daily newspapers and broadcast stations); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding regulation prohibiting network ownership of more than one broadcast station in a service area); *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949) (antitrust decree requiring separation of production and exhibition of motion pictures), aff'd mem. *sub nom. Loew's, Inc.* v. *United States*, 339 U.S. 974 (1950); 15 U.S.C. 1801-1804 (Newspaper Preservation Act); 47 U.S.C. 531 (municipalities may require public access to cable system); 47 U.S.C. 532 (1988 & Supp. V 1993) (cable systems must set aside channels for leased access); 47 U.S.C. 534(b), 535(b) (Supp. V 1993) (cable systems must carry local broadcast stations). See H.R. Rep. No. 934, 98th Cong., 2d Sess. 33 & n.3 (1984) (placing telephone-cable cross-ownership rule in line of authority holding that "the government can restrict concentrated ownership of communications media in a locality, in the interest of diversity").

unfair competition because of the subsidy from the telephone operations.[3]

The potential for such "cross-subsidization" by LECs is particularly serious in the cable market, which is adjacent to, and potentially overlapping with, the telephone market. Affiliated LECs and cable systems could share capital equipment, such as fiber-optic cable, as well as the costs of research and development, administration of the telephone network, and personnel. Also, because the technology has developed for the transmission of video signals over the telephone network, LECs could deliver video programming over their own wires. Thus, LECs would have substantial opportunities to cross-subsidize their cable operations if they were permitted to operate cable systems in their own service areas. A regulatory approach to the problem of cross-subsidization

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[3] See generally *National Rural Telecom Ass'n* v. *FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993); *California* v. *FCC*, 905 F.2d 1217, 1224, 1226-1228, 1233-1238 (9th Cir. 1990); *United States* v. *Western Elec. Co.*, 900 F.2d 283, 289-290 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990); *Southwestern Bell Corp.* v. *FCC*, 896 F.2d 1378, 1379-1380 (D.C. Cir. 1990); *Illinois Bell Tel. Co.* v. *FCC*, 740 F.2d 465, 472 (7th Cir. 1984); *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1368-1369 (D.D.C. 1981); *In re Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, Report and Order*, 95 F.C.C.2d 1117, 1129-1131 (1983) (*BOC Separation Order*); *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 F.C.C.2d 384, 463-464 (1980) (*Computer II*), modified in part on reconsideration, 84 F.C.C.2d 50 (1980), 88 F.C.C.2d 512 (1981), aff'd *sub nom. Computer & Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); General Accounting Office, *Telephone Communications: Controlling Cross-Subsidy Between Regulated and Competitive Services* 50 (Oct. 1987) (*First GAO Report*) (J.A. 92-93); General Accounting Office, *Telecommunications: FCC's Oversight Efforts to Control Cross-Subsidization* 3-4 (Feb. 1993) (J.A. 122-123); Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 Am. Econ. Rev. 1052 (1962); 2 Alfred E. Kahn, *The Economics of Regulation* 54 (1988).

would require extensive supervision and auditing of LECs' use of their capital equipment, deployment of their human resources, and accounting practices.[4]

A second problem posed by entry of LECs into the cable market is the threat of discrimination against their competitors in the use of facilities for the transmission of video signals. That discrimination could take at least two forms. First, traditional cable systems transmit programming to subscribers over wires attached to utility poles or buried underground and brought into subscribers' homes through utility service conduits. LECs have had, historically, effective control over poles and conduits necessary to the operation of a cable system, and they could abuse that control to prevent competing cable operators from using those poles and conduits, or to make it difficult for competitors to maintain their wires as is necessary to ensure adequate quality.[5] Second, LECs wield exclusive control over the wires, switching devices, and other transmission facilities essential to the delivery of video signals over the technically complex modern telephone network. Absent effective regulation, LECs could discriminate against competing video programmers in affording access to that network, by designing the system to favor transmission of their own video signals and providing inferior service and maintenance to competitors using the network. Discrimination unchecked by regulation could cripple competition if LECs were to exceed their traditional role of common carriers of others' signals.[6]

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[4] See J.A. 52, 54-55, 57 (1981 FCC staff study), 251-255 (Owen affidavit); cf. J.A. 84-85, 88-92 (*First GAO Report*, discussing similar problems in LEC entry into other lines of business).

[5] See *In re Applications of Tel. Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307, 324 (1970), aff'd *sub nom. General Tel. Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971).

[6] See *California* v. *FCC*, 39 F.3d 919, 929-930 (9th Cir. 1994); *California* v. *FCC*, 4 F.3d 1505, 1509-1513 (9th Cir. 1993); *United*

2. Section 533(b) has its origins in regulations issued by the Federal Communications Commission (FCC) in 1970 to address the problem of anti-competitive practices by LECs in the cable services market. See 47 C.F.R. 64.601 (1971); *In re Applications of Tel. Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Tel. Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971). The FCC identified "[t]he central problem" as "the anomalous competitive situation between [cable] systems affiliated with the telephone companies, and those which have no such affiliation" (21 F.C.C.2d at 323), and concluded that "[t]he entry by a telephone company * * * into the retailing aspects of [cable] services in the community within which it furnishes communications services can lead to undesirable consequences," including discrimination against unaffiliated cable companies and extension of LECs' telephone monopoly to the cable services market (*id.* at 324). Intending "to insure against any arbitrary blockage of th[e] gateway" and to preserve "a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities," the FCC determined that "the preservation of such competition will best be assured by the exclusion of telephone companies in their service areas from engaging in

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States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 189-190 (D.D.C. 1982), aff'd mem. *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. at 1352-1355; *BOC Separation Order*, 95 F.C.C.2d at 1134-1135; *Computer II*, 77 F.C.C.2d at 463-464. See also *Delaware, L. & W.R.R.* v. *United States*, 231 U.S. 363, 370 (1913) (upholding "commodities clause" of Interstate Commerce Act, 49 U.S.C. 10746, which prohibits common carriers from transporting products in which they have a financial interest, and noting potential for discrimination if common carriers were permitted to haul for their own benefit as well as others').

the sale of [cable] service to the viewing public except where no practical alternative exists to make such service available within a particular community." *Id.* at 325.

In 1980, the FCC directed its staff to study several regulatory restrictions on ownership of cable systems, and in November 1981, the Commission's Office of Plans and Policy issued a report recommending that the telephone-cable cross-ownership bar be retained. See *FCC Policy on Cable Ownership: A Staff Report* 141-178 (J.A. 40-78). The staff report acknowledged that changes in the cable industry made it "no longer appropriate to think of [cable] as an infant," J.A. 41 n.3, but it nonetheless concluded that there were serious disadvantages in cross-ownership, principally in that "telephone companies are regulated exclusive franchise monopolists in their local area," J.A. 52. The staff was especially concerned about cross-subsidization of cable operations by LECs, and it noted that, because cable and telephone systems may share capital equipment, "allocating shared costs between these capital accounts on the basis of actual cost causation will be difficult or impossible." J.A. 57. The staff did not believe that a structural separation of corporate entities providing cable and telephone services would eliminate the danger of cost-shifting. J.A. 67-71. The staff also could not find a regulatory solution to the problem of discrimination in access to the local exchange network. J.A. 73-76.

3. Congress enacted Section 533(b) in the 1984 Cable Act, using language borrowed from the FCC's 1970 regulations. Congress prohibited "any common carrier, subject in whole or in part to subchapter II" of the Communications Act of 1934 (*i.e.*, any LEC), from "provid[ing] video programming directly to subscribers in its telephone service area." 47 U.S.C. 533(b)(1). Congress also prohibited LECs from providing pole or conduit space to any affiliated cable entity for the purpose of providing video programming directly to subscribers. Congress intended "to codify [the] FCC rules concerning the

provision of video programming over cable systems by common carriers." H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984) (*1984 House Report*). Section 533 as a whole was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." *Id.* at 55.

The statute contains several exceptions to the general prohibitions, also derived from the FCC's regulatory regime. Under Section 533(b)(3), LECs may freely provide video programming to customers who reside in a "rural area," as defined by the FCC. LECs may also seek a waiver of the cross-ownership bar for those areas where cable service "demonstrably could not exist" except if provided through a LEC-affiliated entity. 47 U.S.C. 533(b)(4). Finally, Congress authorized the FCC to waive the cross-ownership bar "upon other showing of good cause * * * [and] upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." *Ibid.*

4. Within a few years of the enactment of Section 533(b), LECs and others began to urge its repeal.[7] Beginning in 1987, the FCC conducted extensive public inquiry and rulemaking proceedings regarding the costs, benefits, and continued need for the cross-ownership bar.[8]

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[7] See, *e.g.*, *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 47-60, 143-158, 168-176 (1990); *Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 273-276, 311, 339-342, 398-401, 431-436, 452-463 (1990).

[8] See *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Notice of Inquiry*, 2 F.C.C. Rcd 5092 (1987); *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 F.C.C. Rcd 5849 (1988) (*Further Notice of In-*

In 1992, the FCC again examined the bar in the context of its rulemaking proceedings on "video dialtone," a service made possible by technological advances that permit the transmission of video signals over telephone wires, by which LECs may use their wires to transmit video signals from multiple programmers to subscribers on a common carrier basis. See *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 F.C.C. Rcd 5781, 5783 (1992) (*Video Dialtone Order*), modified in part on reconsideration, 10 F.C.C. Rcd 244 (1994); see also *National Cable Television Ass'n* v. *FCC*, 33 F.3d 66 (D.C. Cir. 1994).

The FCC recommended that Congress replace the cross-ownership bar with an array of regulatory safeguards to prevent abuses by LECs if they entered the cable market. See *Video Dialtone Order*, 7 F.C.C. Rcd at 5847-5851. The FCC did not conclude that the potential for anti-competitive conduct by LECs had disappeared entirely, but it did conclude that the continued risk was outweighed by the potential public interest that would be served by their entry into the cable market. *Id.* at 5849. The FCC stated that, if LECs were allowed to enter the market for providing video programming, it would subject them to extensive regulation:

> [T]he FCC should require that if the benefits exceed the costs, the telephone companies provide video programming through a structurally separated video programming subsidiary; that their video programming be through the video dialtone platform that provides service to multiple programmers; and that the extent of local telephone company-provided

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quiry); *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, First Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry*, 7 F.C.C. Rcd 300 (1991).

programming be limited to a specified percentage of overall capacity.

Id. at 5847-5848; see *id.* at 5850-5851.

Congress, however, declined to repeal the cross-ownership bar. In the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act), Congress revised regulation of the cable industry to stimulate competition. See 47 U.S.C. 541(a)(1) (Supp. V 1993) (prohibiting exclusive cable franchises); 47 U.S.C. 543 (Supp. V. 1993) (requiring cable rate regulation in areas where there is no effective competition); 47 U.S.C. 533(a)(2) (Supp. V 1993) (adopting cross-ownership rules for new wireless broadcast technologies). By those measures, Congress sought to promote "a substantial governmental and First Amendment interest in promoting a diversity of views." 1992 Cable Act, § 2(a)(6), 106 Stat. 1461. But after extensive consideration of the arguments in favor of and against the telephone-cable cross-ownership bar, and several proposals (including those of the FCC and the Departments of Justice and Commerce) to replace the bar with a regulatory approach to the problems of cross-subsidization and discrimination, Congress left the bar in place.[9] The Senate report accompanying the 1992 Cable Act expressed the view that cross-ownership restrictions like Section 533(b) "enhance competition."

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[9] See note 7, *supra*; see also *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 122-123, 226-227, 524-537, 605-616 (1991); *Cable-Instructional TV and S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 2d Sess. 48, 51, 54-55, 95, 96-109, 139-146 (1992); 138 Cong. Rec. S16,663, S16,665-S16,666 (daily ed. Oct. 5, 1992); *id.* at S14,225, S14,237, S14,246-S14,247, S14,250, S14,255-S14,256 (daily ed. Sept. 21, 1992); *id.* at H8671, H8673 (daily ed. Sept. 17, 1992); *id.* at H6489, H6492 (daily ed. July 23, 1992).

S. Rep. No. 92, 102d Cong., 1st Sess. 46-47 (1991) (*1991 Senate Report*); see also S. Rep. No. 456, 101st Cong., 2d Sess. 9 (1990) (*1990 Senate Report*) ("[B]ecause of concerns about the potential for anticompetitive practices by telephone companies and the need to ensure media diversity, the Committee is not now prepared to permit telephone companies to own or control video programming.").

5. Respondents then brought this action in district court, challenging the constitutionality of Section 533(b). Respondents (or their corporate affiliates) provide local exchange telephone services in six States and the District of Columbia, and they desire to provide video programming directly to subscribers in Alexandria, Virginia, where they have a monopoly on local exchange service. Pet. App. 54a, 77a n.17.

The district court granted summary judgment for respondents. It applied an "intermediate level of scrutiny," as set forth in *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), which requires that a content-neutral regulation of the time, place, and manner of speech be "narrowly tailored to serve a significant governmental interest" and "leav[e] open ample alternative channels for communication" to pass constitutional muster. See Pet. App. 94a. The district court found "little doubt that the statute leaves open ample alternative channels for communication," since LECs may, *inter alia*, communicate with subscribers by producing video programming and marketing it to broadcasters and cable operators.

The district court concluded, however, that Section 533(b) is not narrowly tailored because, in its view, there is a lack of "fit" between the statute and the objective of preventing anti-competitive conduct by LECs. Pet. App. 102a. The court accepted, *arguendo*, that regulatory controls would be insufficient to prevent LECs from cross-subsidizing affiliated cable entities. *Id.* at 106a. But the court stressed that, notwithstanding Section

533(b), LECs are permitted to operate systems for the *transport* of unaffiliated entities' video programming if they do not exercise control over the selection of that programming, and the court believed that the dangers of discrimination and cross-subsidization are also present in that permitted situation. Pet. App. 101a-102a. Although the government argued that incentives to anti-competitive conduct are enhanced if LECs select, as well as transmit, the video programming offered on a cable system, the court rejected that argument because, it believed, LECs have no "inherent advantage" in video programming that would permit them to evade regulation. *Id.* at 103a-104a.

6. The court of appeals affirmed. Pet. App. 1a-52a. The court of appeals held that Section 533(b) should be subject to intermediate scrutiny because it is not content-based (Pet. App. 28a), it is not intended to regulate or prohibit any speech because of the message that is conveyed (*id.* at 31a-32a), and it is "justified entirely by the peculiar economic and physical characteristics inherent in the provision of cable service" (*id.* at 34a).[10] Although the court agreed with the government that the interests served by Section 533(b) are significant (Pet. App. 38a-39a), it concluded that the statute is unconstitutional because it is not narrowly tailored. In reaching that conclusion, the court remarked that, because the statute contains no specific factual findings about the need for the particular measure enacted, it owed no deference to Congress's judgment on the question of narrow tailoring. *Id.* at 40a-41a.

The court of appeals first concluded that the threat of discrimination by LECs against their competitors in

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[10] The court of appeals thus rejected respondents' arguments for application of strict scrutiny (Pet. App. 37a) and the government's arguments for "minimal scrutiny" (*id.* at 20a-23a). Judge Michael declined to join the panel's rejection of strict scrutiny; he believed that, since the statute failed intermediate scrutiny, the question whether strict scrutiny should be applied was "academic." *Id.* at 52a.

affording access to utility poles and conduits was insufficient to support the cross-ownership bar. It reasoned that Congress could prohibit such discrimination rather than banning LECs from offering cable services. Pet. App. 42a. The court did not address the separate but related problem of LEC discrimination against competitors in access to the telephone network for transmission of video signals.

On the issue of cross-subsidization, the court of appeals assumed that regulatory oversight (in place of a cross-ownership bar) would be insufficient to prevent that abuse in the video transport market. It also assumed that the prospect of domination of the video programming market would give LECs an " 'irresistible' incentive" to cross-subsidize their video transport operations. Pet. App. 44a-45a. Nevertheless, the court found dispositive its perception that an "obvious less-burdensome alternative" to Section 533(b) exists: "Congress could simply limit [LECs'] editorial control over video programming [on any cable system] to a fixed percentage of the channels available; [LECs] would be required to lease the balance of the channels [to unaffiliated programmers] on a common carrier basis." Pet. App. 47a-48a.

Finally, the court concluded that Section 533(b) does not leave open ample alternative channels for communication by LECs. Pet. App. 49a-51a. Although the court recognized that LECs may freely arrange for their video programming to be distributed by broadcast stations and unaffiliated cable operators, it held the statute invalid because LECs "cannot *guarantee* that video programming they wish to transmit to their local audience via cable television * * * will reach their desired audience." *Id.* at 50a (emphasis added). It believed that Section 533(b) "ban[s] completely a particular manner of expression" to LECs. Pet. App. 51a.

7. On May 16, 1995, the FCC issued a Third Report and Order in its video dialtone rulemaking, in which it concluded that, under the "good cause" waiver provision

of Section 533(b)(4) (see p. 8, *supra*), it has "legal authority to grant waivers allowing [LECs] to provide video programming in their telephone service areas on video dialtone networks." Pet. Supp. App. 2a. Under its construction of Section 533(b)(4), the FCC "will routinely grant a waiver of [the cross-ownership bar] where the [LEC] agrees to abide by the regulations [that the FCC] will establish governing its provision of video programming." Pet. Supp. App. 19a. The FCC also explained that, because "the purpose of the rule is to promote competition," it will not grant waivers "to allow a [LEC] to purchase an incumbent monopolist cable operator in the [LEC's] service area" (*id.* at 16a); its reading of the waiver authority extends only "to permit a [LEC] to provide video programming over video dialtone systems in its telephone service area *in competition with* existing cable operators" (*id.* at 17a) (emphasis added).

The FCC noted that two courts of appeals and several district courts have concluded that Section 533(b) violates the First Amendment.[11] It also observed that this Court has instructed that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." Pet. Supp. App. 6a (quoting *United*

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[11] The Ninth Circuit also declared Section 533(b) unconstitutional in two consolidated cases. *US West, Inc.* v. *United States*, 48 F.3d 1092 (1994); *Pacific Telesis Group* v. *United States*, 48 F.3d 1106 (1994). The statute has been held invalid by district courts in *NYNEX Corp.* v. *United States*, No. 93-323-P-C (D. Me. Dec. 8, 1994), appeal pending, No. 95-1183 (1st Cir.); *Ameritech Corp.* v. *United States*, 867 F. Supp. 721 (N.D. Ill. 1994), appeal pending, No. 95-1223 (7th Cir.); *BellSouth Corp.* v. *United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), appeal pending, No. 94-7036 (11th Cir.); *United States Telephone Ass'n* v. *United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995), appeal pending, No. 95-1175 (D.C. Cir.); *Southwestern Bell Corp.* v. *United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995), appeal pending, No. 95-10478 (5th Cir.); and *Southern New England Telephone Co.* v. *United States*, No. 3:94-CV-80 (DJS) (D. Conn. Apr. 27, 1995), appeal pending, No. 95-6137 (2d Cir.).

States v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994)). The FCC concluded that its interpretation of its waiver authority would "cure [the] constitutional infirmities" perceived in the cross-ownership bar (Pet. Supp. App. 6a n.11) and make it "unnecessary for [the] courts to decide whether a complete prohibition on video programming by [LECs] in their exchange areas is constitutional" (*id.* at 7a), for the LECs would henceforth be able to provide video programming directly to subscribers in their service areas.

The FCC addressed two statutory issues in construing Section 533(b)(4): whether there is "good cause" to waive the cross-ownership bar, and whether a waiver is "justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of [the bar]." Pet. Supp. App. 9a. The FCC found two reasons to conclude that "good cause" exists to allow LECs to provide video programming over video dialtone systems. First, " '[g]ood cause' is a phrase that is commonly associated with changed circumstances" (*id.* at 11a), and the growth in the cable industry from "a fledgling service to a more mature industry" constitutes changed circumstances since Congress enacted the bar in 1984 (*id.* at 10a-11a). Second, "significant advances in technology" that now permit the dissemination of video signals over the telephone network "have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban." *Id.* at 11a-12a.

The FCC also concluded that waiving the bar to allow LECs to provide video programming on video dialtone networks would advance the policies of Section 533(b), competition and diversity in the market for video programming. The FCC emphasized that its video dialtone regulatory framework includes a common carriage element, such that a LEC offering video dialtone must make capacity available to other, unaffiliated video program-

mers. Thus, "[t]he common carrier aspect of video dialtone service promotes both competitive and free speech interests by making room for more than one speaker." Pet. Supp. App. 13a. The FCC also made clear that LECs would be allowed to offer video programming in their service areas only if they agree to abide by regulations that will be adopted to prevent anti-competitive abuses such as cross-subsidization and discrimination against competitors. *Id.* at 18a-19a.[12]

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than two decades, there has been spirited debate over the costs and benefits of local telephone companies' entry into the market for cable services, as there has been debate over their participation in other lines of business, such as information services and long-distance services. The problems presented by the entry of LECs into other markets are substantial and complex, and the best mix of competition, regulation, and structural separation to address those problems has been the subject of sustained attention by Congress, the agencies that administer telecommunications laws, and the interests affected by regulation. Several participants in the debate,

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[12] Congress is also reexamining the cross-ownership bar at this time. On June 16, 1995, the Senate passed a bill that would repeal the cross-ownership bar and would expressly permit LECs to offer video programming through video dialtone systems. See S. 652, 104th Cong., 1st Sess. § 202 (1995); 141 Cong. Rec. S8570, S8577 (daily ed. June 16, 1995). On August 4, 1995, the House of Representatives passed a bill that would permit LECs to offer video programming to subscribers in their service areas, through video dialtone platforms operated by separate affiliates. See H.R. 1555, 104th Cong., 1st Sess. § 201 (1995); 141 Cong. Rec. H8436-H8438 (daily ed. Aug. 4, 1995). The House bill would require the FCC to issue regulations to prevent discrimination in access to the video dialtone system, and would permit state regulators to prevent cross-subsidization. See *id.* at H8437. The House bill would provide limited authority for LECs to invest in and control incumbent cable operators. *Id.* at H8438.

including federal agencies, have suggested that consumer welfare would ultimately be increased by freer LEC participation in the cable market—subject to appropriate regulatory safeguards and in conjunction with removal of barriers to competition in local telephone service. Congress, which is responsible for setting the nation's telecommunications policy, has nonetheless thus far declined to repeal the cross-ownership bar challenged in this case.

There are considerable advantages to the simple cross-ownership restriction enacted by Congress over the much more complex system of administrative supervision that would take its place, were the bar repealed or invalidated. Whether those advantages are outweighed by disadvantages of inefficiency is, of course, subject to much dispute. But that judgment is for Congress to make, and Congress's choice of a cross-ownership bar, which has undeniably been effective in preventing discrimination and cross-subsidization by LECs in the cable market, was a reasonable one. Whatever the arguments against the wisdom of the bar or its effectiveness in promoting competition, those arguments are not of constitutional dimension.

I. Section 533(b) does not require strict scrutiny. The cross-ownership bar is content-neutral; it reflects neither disagreement with any idea that would be expressed by LECs, nor any desire to suppress free expression. To the contrary, the bar is intended to keep channels of communication open by preventing private anti-competitive behavior that could choke off speech by LECs' competitors, and is justified entirely by reference to the economic consequences of LEC participation in the cable market. Section 533(b) is therefore subject at most to the intermediate scrutiny employed for regulations of the time, place, and manner of speech.

II. Section 533(b) survives intermediate scrutiny. The cross-ownership bar advances significant governmental interests in preventing anti-competitive conduct and promoting diversity of communications outlets. It accomplishes those objectives by forestalling LECs' extension of

their telephone monopoly to the cable market through cross-subsidization of their cable affiliates and discrimination against competitors in providing access to essential facilities (utility poles and conduits, and the modern telephone network) for the transmission of video programming. The bar is necessary and narrowly tailored to accomplish Congress's objectives, because it is easily administered and entirely effective. A less restrictive approach would require complex structural and accounting regulations and continual administrative supervision to monitor LECs' compliance with those rules. A regulatory approach also could not assure the same degree of effectiveness in preventing discrimination by LECs against competitors. The bar leaves open ample alternative channels of communication to LECs, which may disseminate video programming within their service areas by numerous other means (including broadcast television), operate cable systems outside their service areas, and use all non-video means of communication everywhere. The statute also gives the FCC authority to waive the bar for good cause to advance the goals of the statute, and in situations where cable service could not be provided except by LECs. The bar therefore applies only in those circumstances in which Congress reasonably concluded it is needed to prevent anti-competitive conduct by LECs.

III. The FCC's recent construction of its waiver authority to permit LECs to offer video programming on video dialtone systems removes any constitutional doubts about the statute. That construction permits LECs to provide video programming in their own service areas, in competition with incumbent cable operators. The construction therefore advances the statute's goals of diversity and competition while making more channels for dissemination of video programming available to LECs.

ARGUMENT

I. SECTION 533(b) DOES NOT REQUIRE STRICT SCRUTINY

We do not dispute that the dissemination of video programming by means of a cable system is "speech" protected by the First Amendment. Nevertheless, "not every interference with speech triggers the same degree of scrutiny under the First Amendment," and so the Court "must decide at the outset the level of scrutiny applicable" to the cross-ownership bar. See *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2456 (1994). Respondents contend (Resp. 10-12) that Section 533(b) is a content-based restriction requiring strict scrutiny. In fact, the cross-ownership rule is a content-neutral regulation of the market for cable services aimed at the economic behavior of LECs, and it regulates only the manner and place in which LECs may disseminate video programming. It is therefore subject to review under the less rigorous, "intermediate" standard applicable to content-neutral time, place, and manner regulations. See *Turner*, 114 S. Ct. at 2469; *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *United States* v. *O'Brien*, 391 U.S. 367 (1968).

1. The "principal inquiry" in determining whether a regulation is content-based or content-neutral "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. Under that inquiry, Section 533(b) is content-neutral. The restriction on LEC ownership of cable systems is unrelated to the content of any programming that LECs might offer, were they allowed to operate cable systems in their service areas. It is irrelevant to the statute whether the video programming that would be transmitted is "commercial or noncommercial, independent or network-affiliated, English or Spanish language, religious or secular." *Turner*, 114 S. Ct. at 2460.

Even if a regulation is facially content-neutral, it may also be treated as content-based if the government's "manifest purpose is to regulate speech because of the message it conveys." *Turner*, 114 S. Ct. at 2461. Section 533(b) is not motivated by hostility to any message, however, and the government's interests are entirely unrelated to the suppression of free expression. See *ibid.*; *Ward*, 491 U.S. at 791. Indeed, the objective of the cross-ownership restriction is to promote free expression through diversity of media outlets. See *1984 House Report* 33, 55; cf. *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 801 (1978) (*NCCB*). The statute recognizes that LECs, if unrestrained by regulation, have the ability and incentive to compete unfairly against other cable operators in the same geographical market, because of their physical control over essential facilities for the transmission of cable signals and their monoply power over local telephone service. That control could enable LECs to impede the dissemination of cable programming by their competitors. Cf. *Turner*, 114 S. Ct. at 2466 ("[S]imply by virtue of its ownership of the essential pathway for cable speech, a cable operator can * * * silence the voice of competing speakers."). Section 533(b), like the predecessor FCC rules, was designed "to insure against any arbitrary blockage of the gateway" (21 F.C.C.2d at 325), and Congress "[took] steps to ensure that private interests not restrict * * * the free flow of information and ideas" (*Turner*, 114 S. Ct. at 2466).

Respondents maintain that Section 533(b) is content-based because it regulates only the dissemination of "video programming," and because "video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. 522(19) (Supp. V 1993). As the court of appeals correctly observed (Pet. App. 26a-28a), however, the statute's reference to "video programming" distinguishes speech solely "on the

basis of the mode of delivery of the speech" (*id.* at 28a), and not its content. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 656 (1984) (plurality opinion) (limitations on reproduction of currency "restrict only the manner in which the illustrations can be presented"). While LECs may not operate their own cable systems in their service areas, they may deliver the same video messages to those communities using broadcast television stations, direct broadcast statellite systems, unaffiliated cable systems, and videocassettes. They may also deliver messages to the public through newspapers, leaflets, and radio stations.

The FCC has interpreted the statutory definition of "video programming" to mean that "Congress intended to prohibit only [LEC] provision of programming comparable to that provided by broadcast television stations in 1984." *Video Dialtone Order*, 7 F.C.C. Rcd at 5820. As so construed, the statute distinguishes the one-way, non-interactive television technology familiar to Congress in 1984 from other forms of speech that were under development at the time and were preserved for LECs, such as interactive video and videotext. See *id.* at 5820-5823; *1984 House Report* 57 ("[N]othing in this section shall be construed to limit [LEC] provision of information services or other non-video programming."). The statutory definition of "video programming" does not, however, contain any reference to the subject matter of television programs, and the FCC has not construed it to include any element of content.[13]

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[13] Given the "abundant discretion" that television licensees retain over programming choices, as well as the breadth of programming that was disseminated on television in 1984, it would be difficult to interpret the Act's reference to "video programming" to include any element of content. Cf. *Turner*, 114 S. Ct. at 2464. But even if the statutory reference to "video programming" is ambiguous, the FCC's construction of it to include a technological distinction, but not an element of content, is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984). Deference to the FCC's construction is par-

As multimedia speech develops, instances may arise in which it will be difficult to determine whether a certain series of video images is "comparable to" television broadcasting. See *Video Dialtone Order*, 7 F.C.C. Rcd at 5820-5821. But even if one must examine the images to determine whether they come within the scope of Section 533(b), that would not make the bar content-based. The focus of the inquiry is on the manner in which the message is presented, and not on the ideas expressed in the message. Cf. *Ward*, 491 U.S. at 792-793 (noting that city had disclaimed "any interest in imposing its own view of appropriate sound mix on performers," and that its interest extended only to "the clearly content-neutral" goal of reducing noise).

Finally, as the district court noted (Pet. App. 88a-93a), even a regulation of speech that contains an element of content distinction does not require strict scrutiny if the regulation is "*justified* without reference to the content of the regulated speech." *City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986); *Ward*, 491 U.S. at 791. In determining whether strict scrutiny is necessary, "[t]he government's purpose is the controlling consideration." *Ibid.* Under that inquiry as well, Section 533(b) does not require strict scrutiny, for its justification is unrelated to the content of any message that would be disseminated. The purpose of Section 533(b) is the prevention of certain well-known economic practices that present a danger to free expression and competition—not "[the] suppress[ion] * * * of unpopular views." *Renton*, 475 U.S. at 48. The statute "is neutral—indeed it is silent—concerning any speaker's point of view." *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 803-804 (1984).

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ticularly appropriate in this case because it avoids the constitutional questions that would be created if the statute were construed to include a content-based distinction. Cf. *Jean* v. *Nelson*, 472 U.S. 846, 855-856 (1985).

2. Nor is Section 533(b) subject to strict scrutiny on the theory that it is a "direct ban on speech as such." Resp. 10. Content-neutral regulations of speech are subject only to intermediate scrutiny, "even though they directly limit oral or written expression." See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984). For example, in *Frisby* v. *Schultz*, 487 U.S. 474 (1988), in which the Court upheld an ordinance banning picketing in front of residences, the Court observed that the prohibition was content-neutral (*id.* at 481-482), and it applied the "intermediate" standard of review applicable to content-neutral regulations (see *id.* at 482 (inquiring whether the ordinance was "narrowly tailored to serve a significant government interest" and whether it "[left] open ample alternative channels of communication"); *id.* at 492-493 (Brennan, J., dissenting) (agreeing that the residential picketing ban was "subject to the well-settled time, place, and manner test")). Cf. *Ward*, 491 U.S. at 791 (applying same test); *Clark*, 468 U.S. at 293 (same). In *Vincent*, the Court applied a similar test, drawn from *United States* v. *O'Brien*, *supra*, to the content-neutral prohibition on the posting of signs at issue in that case. See 466 U.S. at 804-805, 808.[14]

As a content-neutral regulation of the market for cable services, Section 533(b) must therefore be analyzed under the intermediate standard of scrutiny applicable to time, place, and manner regulations. The statute is not a blanket ban on speech by LECs; it prohibits them from operating cable systems only in the areas where they offer local telephone service. In all other areas, where the

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[14] Thus, notwithstanding respondents' argument that the *O'Brien* test "has been reserved exclusively for regulations having only an 'incidental' effect" on speech (Resp. 10), it is clear that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark*, 468 U.S. at 298; see *id.* at 298 n.8; *Turner*, 114 S. Ct. at 2469.

dangers of anti-competitive conduct by LECs are not present, they are free to offer cable service. The statute also regulates only speech in video form, and not the various other modes of speech that could deliver the same message. Cf. *Frisby*, 487 U.S. at 484 (observing that, although protesters could not engage in residential picketing, they could distribute literature and contact residents by telephone). Finally, the statute regulates only video programming delivered by means of cable systems—not video programming disseminated by all other possible means, including broadcast television, satellite television, and videocassettes. The court of appeals correctly concluded, therefore, that Section 533(b) is subject to "intermediate scrutiny." Pet. App. 38a.

II. SECTION 533(b) MEETS THE REQUIREMENTS OF INTERMEDIATE SCRUTINY

A. Section 533(b) Furthers Significant Governmental Interests

A content-neutral regulation of speech is valid if it is "narrowly tailored to serve a significant governmental interest, and * * * leav[es] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. The court of appeals correctly concluded that the interests served by Section 533(b) are significant. See Pet. App. 38a-39a. In *Turner*, this Court made clear that "the Government's interest in eliminating restraints on fair competition is always substantial," as is "assuring that the public has access to a multiplicity of information sources, [which] promotes values central to the First Amendment." 114 S. Ct. at 2470. With respect to the cable market in particular, *Turner* also established that the government has a substantial interest in "ensur[ing] that private interests not restrict, through physical control of [the] critical [bottleneck] of [cable] communication, the free flow of information and ideas," *id.* at 2466,

an interest directly relevant to LECs' control over physical facilities for the transmission of cable signals.

Nor can there be doubt that Section 533(b) actually furthers those significant interests. Cross-ownership restrictions have long been used by regulators to curtail the potential for abuse of market power and to encourage diversity in holdings.[15] The utility of such rules to prevent cross-subsidization by monopolists seeking to enter competitive markets has also been borne out by the courts' experience with the antitrust suit that resulted in the breakup of the Bell System. Cross-subsidization by LECs formerly affiliated with the Bell System has been a principal issue throughout that litigation, in which the district court found that exclusion of those LECs from certain lines of business was necessary to prevent anti-competitive conduct by them.[16] Section 533(b) is also effective at preventing LECs from abusing their control over facilities to discriminate against competitors. By completely excluding LECs from cable programming in their service areas, the bar removes the incentive for them to discriminate against their competitors in that business.

The district court suggested (Pet. App. 102a-104a), however, that Section 533(b) cannot prevent anti-competitive behavior by LECs because the bar does not prohibit them from *transporting* video signals over cable systems to subscribers, as long as they do not also participate in the selection of the video programming

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[15] See, *e.g.*, Public Utility Holding Company Act of 1935, 15 U.S.C. 79a(a) and (b); Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.*; see also *NCCB, supra* (upholding FCC restrictions on cross-ownership of newspapers and broadcast stations in same community); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193 (1956) (upholding FCC regulation limiting number of broadcast licenses that any one person could acquire).

[16] See *1984 House Report* 32-33; *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. at 1368-1369; *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. at 188-191.

transmitted over the cable systems.[17] The district court questioned why Congress would have allowed LECs to participate in the video transport market, if it was concerned about the misallocation of costs of facilities common to telephone and video *transport* operations. See Pet. App. 103a-104a & n.31.

The district court failed to appreciate several points about the justification for Section 533(b). First, as the 1981 FCC staff report noted (J.A. 56 n.34), LECs' incentive and ability to cross-subsidize are significantly diminished when they transport video programming in the manner of common carriers for unaffiliated entities. State regulators can limit LECs' revenues from such operations under traditional rate-of-return principles applicable to common carriers.

Second, the lucrative video programming market makes entry into the cable business particularly attractive to LECs. Once in that market, LECs could compete unfairly through their ability to cross-subsidize their video transport facilities. The evidence presented to the district court established that LECs' incentives to cross-subsidize and to discriminate would be "greatly enhanced if [they] are also allowed to exploit monopoly control of video transmission by earning excess profits in video programming." J.A. 332 (Owen reply affidavit). See also C. Edwin Baker, *Merging Phone and Cable*, 17 Hastings Comm. & Ent. L.J. 97, 133 (1994) ("If allowed to provide programming, [LECs'] power in the video transport market would allow them to exercise undue power in the

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[17] The FCC has consistently taken the position that the cross-ownership bar does not prohibit LECs from offering "channel service," under which LECs may build and operate cable facilities for the physical transport of video signals but play no role in the selection of the video programming offered on those facilities. *Further Notice of Inquiry*, 3 F.C.C. Rcd at 5857. In essence, a LEC offering channel service owns the cable system but leases it to unaffiliated cable operators.

video programming market and would increase the value to the phone company of monopolizing transport."). The FCC has also recognized that Section 533(b) protects "competition in the provision of [cable] services and facilities" (*i.e.*, programming and transmission) by "surely reduc[ing] [LECs'] incentive and ability to engage in anti-competitive conduct in [their] service areas." *Further Notice of Inquiry*, n.8, *supra*, 3 F.C.C. Rcd at 5864. Therefore, the fact that Section 533(b) permits LECs to enter the video transport market without control over programming is not a flaw in the economic theory underlying the cross-ownership bar, but a recognition that there is less opportunity or incentive for anti-competitive behavior when LECs are confined to carrying others' programming in a role similar to their traditional one as common carriers. See Baker, *supra*, at 132 ("As long as the phone company cannot itself offer cable programming, it has no incentive to drive cable companies out of business.").

B. Section 533(b) Is Narrowly Tailored

1. The court of appeals invalidated Section 533(b) because it concluded that a less restrictive alternative would be equally effective to prevent anti-competitive behavior by LECs; it suggested that the cross-ownership bar could be replaced by an arrangement under which LECs would be permitted to operate a cable system but would be restricted to editorial control of a fixed percentage of the channels on that system. Pet. App. 47a-48a. The court of appeals also criticized Congress and the FCC for not making any "underlying factual findings" to support their implicit conclusion that less sweeping regulatory alternatives would not effectively achieve the government's interests. *Id.* at 45a-47a. In the absence of such findings, the court declined to "accede to Congress' judgment" that the bar is necessary to achieve those interests. *Id.* at 40a-41a.

The court of appeals' disagreement with Congress's choice of a cross-ownership bar cannot be reconciled with this Court's "intermediate scrutiny" decisions, which require considerably more deference to Congress's judgment that the particular approach chosen for the regulation of the cable market is necessary to prevent anti-competitive abuse effectively. See *Clark*, 468 U.S. at 299. This Court has made clear that a content-neutral regulation "need not be the least restrictive or least intrusive means of [achieving the government's interest]. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward*, 491 U.S. at 798-799 (footnote omitted); *Turner*, 114 S. Ct. at 2469-2470.

The Court has also stressed that it is "loath to second-guess the Government's judgment" of narrow tailoring. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 478 (1989). Thus, what narrow tailoring requires in this context is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served[.]' * * * Within those bounds [the courts must] leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* at 480 (citations omitted).[18] Given the difficulty of finding a solution to the economic problems that Congress perceived in LEC participation in the cable market, the First Amendment affords Congress "a

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[18] Although *Fox* was a commercial speech case, that decision states that the requirement of narrow tailoring for regulation of commercial speech is "substantially similar" to the same requirement for content-neutral time, place, and manner regulations of non-commercial speech. 492 U.S. at 477-478; see *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987).

reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton*, 475 U.S. at 52.

The courts' obligation not to "second-guess" Congress does not depend on the presence of factual findings in the statute or the legislative history that the bar is necessary, as the court of appeals seemed to think (see Pet. App. 40a-41a, 45a). In cases like this one, the question for the courts is whether the regulation of speech is reasonably necessary to advance any significant interest of the government, not whether the enacting Congress expressly found it to be necessary. "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner*, 114 S. Ct. at 2471 (plurality opinion).[19] Therefore, the question of narrow tailoring is not whether Congress expressly found that Section 533(b) is necessary to achieve the government's interests effectively, but whether the economic and predictive judgments underlying Section 533(b) are reasonable to support such a conclusion. See *id.* at 2473 (Stevens, J., concurring in part and concurring in the judgment) ("But the question for us is merely whether Congress *could fairly conclude* that cable operators' monopoly position threatens the continued viability of broadcast television and that must-carry is an appropriate means of minimizing that risk.") (emphasis added and omitted).

2. Under the proper standards, Section 533(b) is narrowly tailored, and the court of appeals' reliance on what it believed to be a less restrictive alternative was an

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[19] Indeed, in arguing that a regulation is narrowly tailored, the government may rely on evidence and arguments that were not presented to the enacting Congress, just as it may advance interests to support a regulation of speech that were not considered when the regulation was enacted. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 70-71 (1983); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

inappropriate substitution of its judgment for Congress's policy decision. The restriction is not "substantially broader than necessary" to achieve the government's interests. *Ward*, 491 U.S. at 800. Section 533(b) restricts LECs' provision of video programming only in the specific situation in which Congress identified a potential for anti-competitive behavior. LECs remain free to speak to subscribers in their service areas by a variety of means that do not present that danger. They may, for example, operate local television broadcast stations, which would be carried over local cable systems, by virtue of the 1992 Cable Act's must-carry rules. See 47 U.S.C. 534(a) (Supp. V 1993); *Turner*, 114 S. Ct. at 2453. They may produce their own video programming and offer it to local cable operators for transmission, and may also gain access to cable systems for their speech through the "leased access" provisions of the Cable Act (47 U.S.C. 532 (1988 & Supp. V 1993)). The Cable Act also does not prevent them from operating traditional cable systems anywhere *outside* their own service areas.

In addition, the Cable Act does not prohibit LECs from operating direct broadcast satellite systems (which can provide hundreds of channels of video programming) or microwave-based multichannel "wireless cable" systems anywhere in the country, including their own service areas. See *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: First Report*, 9 F.C.C. Rcd 7442, 7473-7478 (1994); *American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995). The Cable Act also preserved, for LECs, the potential for dramatically increased speech opportunities in their service areas and elsewhere through the development of interactive and multimedia services. *Video Dialtone Order*, 7 F.C.C. Rcd at 5788, 5822-5823; see also *1984 House Report* 57. Finally, the statute permits the FCC to waive the bar in situations in which cable service could not

exist except through LECs, and also for "good cause" to advance the policies of the statute as a whole. 47 U.S.C. 533(b)(4). Congress has therefore done no more than to address "the exact source of the evil it sought to remedy." *Vincent*, 466 U.S. at 808.

3. Congress reasonably concluded that the cross-ownership bar is necessary to prevent cross-subsidization by LECs in the cable market effectively. The only alternative to a restriction like Section 533(b) would be a complex set of structural and accounting rules imposed and enforced by the FCC to ensure that LECs do not subsidy transfer costs from their cable affiliates to their telephone operations.[20] Whether or not it would be *possible* to prevent cross-subsidization through such rules, if the FCC were given adequate resources to monitor LECs effectively, that approach does have significant disadvantages, such that Congress could reasonably choose a cross-ownership bar instead. The regulatory task of containing cross-subsidization through accounting rules is decidely complex. The inherent subjectivity of cost accounting issues that would have to be addressed under a regulatory approach, the ongoing possibility of evasion of, and litigation over, accounting rules set by the FCC, and the need for substantial auditing resources sufficient to prevent evasion all support Congress's choice of a simpler approach to the problem of unfair cost-shifting. See J.A. 54-58 (1981 FCC staff study, doubting feasibility of regulatory solution to cost-shifting), 83-85, 88-90 (General Accounting Office (GAO) Report detailing practical and conceptual difficulties in containing cost-shifting), 124-131 (second GAO Report, stressing need for adequate auditing resources), 234-236 (Robinson affidavit,

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[20] Cf. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (reviewing FCC rules to contain such abuse by LECs in information services market); *United States v. Western Elec. Co.*, 900 F.2d at 288-298 (considering adequacy of such rules to justify modification of Bell System consent decree).

stressing complexity of accounting rules), 266-268 (Owen affidavit, stressing same).[21]

Congress drew the "reasonable inferenc[e]" that the bar is necessary from "substantial evidence." *Turner*, 114 S. Ct. at 2471 (plurality opinion). Congress enacted Section 533(b) in 1984 against a background that included the 1981 FCC staff study and the recent

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[21] Respondents have pointed out that the FCC and other agencies have recommended that Congress replace the cross-ownership bar with regulatory safeguards such as accounting rules and structural separation of telephone and cable affiliates, and have suggested that those safeguards would be adequate to prevent cross-subsidization. The FCC and the Department of Justice, relying in part on regulatory safeguards, also supported modification of the Bell System antitrust consent decree to remove the prohibition on provision of information services by the former Bell-System LECs. See J.A. 337-360; *United States* v. *Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993). Those agencies have not stated, however, that there would be *no* risk of discrimination or cross-subsidization if LECs were permitted to provide video programming, or that reasonable minds could not differ about the need for exclusion from a market, rather than regulatory safeguards, to prevent anti-competitive abuse effectively. Cf. *National Rural Telecom Ass'n*, 988 F.2d at 180 (noting FCC's acknowledgment that various regulatory alternatives are not "ironclad guarantees against cost shifting"). The FCC has concluded, rather, that the risk of abuse by LECs in the cable market is outweighed by the potential benefits served by their entry into that market (*Video Dialtone Order*, 7 F.C.C. Rcd at 5849), and it continues to believe that some regulatory safeguards would be necessary to contain abuses by LECs (*id.* at 5847-5851). See also Statement of Assistant Attorney General Anne K. Bingaman Before the Senate Commerce Committee 14-17 (Mar. 2, 1995) (lodged with the Clerk) (stressing that restrictions on LECs' competition with cable systems should be removed in conjunction with restrictions on competition by cable systems and others in provision of local telephone service). Nor is it unusual for federal agencies and Congress to disagree about the costs and benefits of a particular policy. Since the issue in this case is the permissibility of *Congress's* predictive judgment that exclusion from the cable market is necessary to prevent abuse by LECs, that is the judgment to which the courts owe substantial deference. See pp. 27-29, *supra*.

breakup of the Bell System. Its decision to exclude LECs from the cable market relied on the district court's conclusion in the Bell antitrust suit that exclusion of the Bell-System LECs from other lines of business was necessary to prevent cross-subsidization. See *1984 House Report* 33. When Congress returned to the issue in the late 1980s and early 1990s, it had a warning from the GAO about serious practical difficulties in containing cross-subsidization of new lines of business by LECs. See J.A. 79-101. Congressional committees also heard testimony from parties opposing repeal of the bar that regulation could not effectively prevent LECs from engaging in anti-competitive behavior, and that entry of LECs into the cable services market would exacerbate structural problems with that market.[22] Those interests also brought to Congress's attention the first GAO Report and court decisions calling into question the efficacy of alternative

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[22] *Cable-Instructional TV and S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 2d Sess. 115-139 (1992); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 206-211, 538-602, 617-635, 699-704, 727-745 (1991); *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 61-84, 89-125, 126-134, 177-194 (1990); *Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 238-239, 341-355, 559-560 (1990); *Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 436-451, 464-474 (1990); *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 98-99, 114-121 (1990).

safeguards such as accounting rules.[23] The Senate Commerce Committee, which in 1990 examined in detail the arguments for and against repeal of Section 533(b), concluded it "could not at the present time support repeal[,] * * * because of concerns about the potential for anti-competitive practices by telephone companies and the need to ensure media diversity." *1990 Senate Report* 8-9; see also *1991 Senate Report* 46-47.[24]

Given the difficulties in monitoring cost-shifting by LECs, the court of appeals understandably accepted, *arguendo*, that accounting safeguards would not be sufficient to prevent that abuse. Pet. App. 45a; see *id.* at 106a (same assumption by district court). Nevertheless, the court of appeals suggested that "Congress could simply limit [LECs'] editorial control over video programming to a fixed percentage of the channels available; [LECs] would be required to lease the balance of the channels on a common carrier basis to various video programmers, without regard to content." *Id.* at 47a-48a. That suggestion does not solve the problem identified by Congress, however, because LECs could still transfer the

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[23] *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 633, 743 (1991); *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 62, 69, 96-97, 119-120 (1990).

[24] Regulators continue to find evidence of cost-shifting by LECs. A 1988 FCC audit tentatively concluded that NYNEX Corporation had engaged in a pattern of cross-subsidization of unregulated affiliates involving more than $100 million. *In re New York Tel. Co.*, 5 F.C.C. Rcd 866, 866-869 (1990). NYNEX later entered into a consent decree with the FCC, in which it admitted no liability but agreed to make adjustments to its books and to make a voluntary contribution of $1,419,000 to the United States Treasury. *In re New York Tel. Co.*, 5 F.C.C. Rcd 5892 (1990). See also J.A. 260-262 (Owen affidavit, describing similar findings of LECs' cross-subsidization by state utility regulators).

costs of their cable operations to their monoply telephone operations. See J.A. 68-69 (FCC staff report). Their incentive to do so would grow in proportion to their editorial control over programming carried over their cable system. See *ibid.* ("[T]he higher the level [of LEC control over cable channels], the greater is the danger from telephone monopoly power."). The court's suggestion would actually magnify the complexity of the accounting problems, because LECs would have to separate their costs attributable to their telephone and cable operations, and also their costs attributable to the portions of the cable system over which they did, and did not, maintain editorial control. Finally, choosing the precise percentage of editorial control over a cable system that would simultaneously contain LECs' incentive to cross-subsidize but also ensure them adequate channels of communication would be difficult, and the court's suggestion would relegate Congress and the FCC to a process of continual trial and error to accommodate those concerns.

4. It is also reasonable to conclude that the cross-ownership bar is necessary to prevent LECs from abusing their control over the poles and conduits essential to the operation of a cable system (as the FCC concluded in 1970),[25] and from discriminating against competitors using the modern telephone network to transmit video programming. The court of appeals rejected the government's interest in preventing discrimination as a justification for the bar, reasoning that Congress could pass legislation to prohibit discrimination by LECs. Pet. App. 42a. Prohibiting discrimination is hardly the same thing as effectively preventing it, however. Even if Congress did replace Section 533(b) with the legislation suggested

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[25] When it implemented the cross-ownership bar, the FCC noted that "numerous parties" had complained about discriminatory conduct by LECs in providing access to utility poles for the construction of cable television systems. *1970 FCC Rules*, 21 F.C.C.2d at 324.

by the court of appeals, LECs' control over the facilities used in transmitting video programming would still give them great economic power over competitors needing those facilities that could be abused. It could be difficult for regulators to prove discrimination, and even to develop less restrictive prophylactic rules to prevent it. See J.A. 73-74 (FCC staff study); 231-233 (Robinson affidavit, discussing difficulties in preventing discrimination by LECs in access to their facilities).

For example, a typical licensing agreement between respondents' Virginia LEC and a cable carrier granting access to the LEC's poles and conduits gives the telephone company discretion to determine whether space is available on a pole and conduit system for cable attachments, to refuse access if it would interfere with the quality of telephone communications or other utility facilities already in place, and to decide exactly where cable attachments should be placed. The cable operator is also required to obtain the LEC's permission to carry out maintenance of the cable attachments. J.A. 104, 108, 109-110. LECs could abuse such provisions to frustrate their competitors' ability to reach their customers and to keep their equipment adequately maintained, even though the provisions might appear proper to allow LECs to maintain the quality of their own equipment.

In the case of access to the telephone network for transmission of video programming, the threat of LEC discrimination against competitors could be even more severe and elusive, for LECs have much greater expertise in the operation of that technically complex network than do their competitors. LECs could use their control over the network to ensure that the quality of their own video signals is better than that of their competitors. Also, because programmers intending to use the telephone network to transmit video signals must coordinate their use of the network with the LEC that controls it, the LEC could use its position to learn its competitors' marketing

plans and other proprietary information. See J.A. 268-269 (Owen affidavit); cf. *California* v. *FCC*, 39 F.3d 919, 927-931 (9th Cir. 1994) (stressing danger of such discrimination in LECs' participation in information services market).

While a law prohibiting discrimination might declare such practices illegal, it could be difficult for competitors or the government to prove that LECs had abused their control over telecommunications facilities in any particular case, and an extensive supervisory administration could be necessary to police LECs' control over the network, poles, and conduit space. See J.A. 230-231 (Robinson affidavit, noting "formidable complexity" of the task). Even if it is *possible* to prevent such discrimination through promulgation and enforcement of complex technical specifications, those methods have such disadvantages in implementation and effectiveness that it was reasonable for Congress to have chosen a cross-ownership bar instead. See *Ward*, 491 U.S. at 800. A bar on LEC ownership of cable systems in their service areas requires little administrative supervision, and it is completely effective in preventing discrimination. By excluding LECs from the local cable market, it removes entirely their incentive to discriminate against competitors in the cable business.

C. LECs Have Ample Alternative Channels Of Communication

As the district court observed, LECs "are by no means 'silenced' by the operation of [Section] 533(b)." Pet. App. 94a. While LECs are precluded from operating cable systems within their service areas, they may purchase or operate local broadcast television stations (and even national television networks that do not own cable systems in their service areas), establish multichannel direct broadcast satellite systems, and create program-

ming for cablecast on cable channels carried by unaffiliated cable systems. They may also operate cable systems outside their common-carrier service areas. See pp. 30-31, *supra*. The assertion that Section 533(b) excludes LECs from "an entire medium of expression" (Resp. 8 n.9) is incorrect.

The court of appeals believed, however, that Section 533(b) is invalid because LECs "cannot *guarantee* that video programming they wish to transmit * * * will reach their desired audience." Pet. App. 50a (emphasis added). In fact, LECs can effectively reach a broad audience in any community by operating a local broadcast television station, which would be carried over cable systems under the 1992 Cable Act's must-carry rule, or by operating a direct broadcast satellite system. See p. 30, *supra*. But in any event, the Court has rejected the contention that the First Amendment includes a "guarantee" of reaching an audience in a particular way. In *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld a restriction limiting the distribution of religious literature and solicitation of funds at a fairground to designated locations, even though the religious organization maintained that its proselytizing could be done successfully "only by intercepting fair patrons as they move about." *Id.* at 653. In light of the "alternative forums for the expression of * * * protected speech" that existed both within and outside the fairgrounds (*id.* at 654-655), the Court concluded that the restriction was valid. LECs may similarly communicate their messages to the general public in video format, both within and outside their service areas; only one mode of delivery in specific places is denied to them, because of the potential anti-competitive economic consequences of their using that mechanism in those places. There is no "barrier to delivering to the media, or to the public by other means" (*Clark*, 468 U.S. at 295), any message that LECs wish to disseminate.

III. THE FCC'S THIRD REPORT AND ORDER ELIMINATES ANY DOUBTS ABOUT THE CONSTITUTIONALITY OF SECTION 533(b)

As we have argued, a restriction on LECs' participation in the cable market in their service areas satisfies the First Amendment, and the court of appeals' decision to the contrary was erroneous. Even if we assume, however, that a flat ban on LECs' provision of video programming on cable systems in their service areas would contravene the First Amendment, the FCC's Third Report and Order (Pet. Supp. App. 1a-21a), authoritatively construing the waiver authority delegated to it by Congress in Section 533(b)(4), eliminates the constitutional objections to the statutory regime raised by the court of appeals. The FCC's construction of Section 533(b)(4), which was not available to the court of appeals,[26] makes clear that Section 533(b), as a whole, is narrowly tailored and leaves open ample channels of communication to LECs. It therefore provides additional grounds for reversal of the judgment below.

1. In the Third Report and Order, the FCC construed the waiver authority to permit a substantial entry by LECs into the video programming market. See pp. 13-16, *supra*. Under that construction, LECs may provide their own video programming directly to subscribers in their telephone service areas, if that programming is delivered by means of a video dialtone system in competition with an incumbent cable operator. Pet. Supp. App. 9a, 16a-17a. The FCC has initiated the process of designing regulatory safeguards to prevent cross-subsidization and discrimination by LECs in video dialtone services, *id.* at 14a n.35, and it will "routinely" grant waivers of the cross-ownership bar, under Section 533(b)(4), to LECs that

[26] For that reason, we suggested at the petition stage that the Court vacate the judgment of the court of appeals and remand the case to that court for further consideration (Pet. Supp. Br. 7).

agree to abide by those safeguards in their video dialtone systems, Pet. Supp. App. 19a.

The FCC observed that Section 533(b)(4) gives it authority to grant waivers for "good cause," a phrase that is "commonly associated with changed circumstances." Pet. Supp. App. 11a. It concluded that the growth of the cable industry and the dramatic technological advances in the delivery of video programming since 1984 are "changed circumstances" sufficient to constitute "good cause," within the meaning of the statute. It also found that those changed circumstances have mitigated the threat to competition that animated the cross-ownership bar to such a degree that greater entry by LECs into the video programming market will not undermine the objectives of the statute as a whole. *Id.* at 11a-12a.

Indeed, the FCC concluded that a construction of Section 533(b)(4) to permit LECs to provide video programming on video dialtone networks will advance the policies of Section 533(b)—competition and diversity in communications. Pet. Supp. App. 13a. The FCC noted that its video dialtone regulatory framework requires a common carriage element, such that LECs offering video dialtone service must make capacity available to other, unaffiliated programmers. Thus, it concluded, LEC provision of video dialtone "promotes both competitive and free speech interests by making room for more than one speaker." *Ibid.*

The FCC also rested its construction of Section 533(b)(4) on the fact that the construction obviates the purported constitutional problems that the courts have identified in Section 533(b). Pet. Supp. App. 14a-16a. Heeding this Court's admonition that "a statute is to be construed where fairly possible so as to avoid [substantial] constitutional questions," *id.* at 16a (quoting *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1995)), the FCC concluded that its reading of the statute, by permitting greater LEC participation in video

programming, would "eliminate [the constitutional] doubts" that have been suggested but would not be "plainly contrary to the intent of Congress." *Ibid.* (quoting *X-Citement Video*, 115 S. Ct. at 472).

Finally, the FCC noted that its construction does not raise any of the constitutional concerns that have been associated with waiver provisions in other First Amendment contexts. See Pet. Supp. App. 17a-18a. It stressed that its construction does not lodge any discretion in any official to grant or deny a waiver based on the content of the speech, but rather provides blanket authorization to offer programming by video dialtone, upon compliance with regulations to be published that will be designed to prevent anti-competitive conduct. Accordingly, the FCC observed, there is no "threat of censorship that by its very existence chills free speech." *Id.* at 18a-19a.

2. The FCC's authoritative construction of Section 533(b)(4) removes the constitutional doubts about Section 533(b) that were raised by the court of appeals. Under the operation of the statute as a whole, including Section 533(b)(4) as now interpreted, LECs will "have abundant opportunities to speak." Pet. Supp. App. 15a. The FCC has established that the door is open for LECs to use their video dialtone systems in the manner of a cable system, to distribute multiple channels of their own programming, as well as the programming of others, selected with editorial control. While its construction does not permit LECs to take over incumbent monopolist cable operators (*id.* at 16a-17a), that limitation does not prevent LECs from offering, on a video dialtone system, the same programming that could be offered on a traditional cable system. LECs therefore have "ample alternative modes of communication" at their disposal. *Vincent*, 466 U.S. at 812.[27]

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[27] The limitation is also consistent with the statute's goal of (and Congress's significant interest in) preventing the extension

The FCC's construction also removes any objections to the tailoring of the congressional regime. LECs may enter the market for distribution of multichannel video programming, on the condition that they also set aside a significant portion of the video dialtone network for distribution of other programmers' video speech on a common carriage basis. Pet. Supp. App. 14a-15a. That is precisely the "obvious less-burdensome alternative" identified by the court of appeals as preferable to Congress's exclusion of LECs from the cable market. See Pet. App. 47a-48a.

Given their opportunity to disseminate video programming on video dialtone networks, respondents cannot, as defenders of the court of appeals' facial invalidation of the statute, "establish that no set of circumstances exists under which [Section 533(b)] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Under the FCC's waiver authority, moreover, respondents will obtain their principal objective, the ability to develop a video dialtone system on their own telephone network for the transmission of their own programming. See J.A. 13, 15 (complaint). What LECs have not obtained through the FCC's construction of its waiver authority is the right to purchase incumbent cable operators. But Congress and the FCC have reasonably concluded, after their "lengthy investigation of the relationship between the cable and [telephone] industries" (see *Turner*, 114 S. Ct. at 2475 (Stevens, J., concurring in part and concurring in the judgment)), that to permit LECs to do so would involve too great a risk of extending their telephone monopoly to the cable market. Their decision furthers the "basic tenet of national communications policy"—that "the

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of LECs' telephone monopolies into the cable market, and with the FCC's policy of promoting diversity in communications media by encouraging the development of video dialtone as another outlet for video speech. See *Video Dialtone Order*, 7 F.C.C. Rcd at 5783.

widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* at 2470 (opinion of the Court).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

GEORGE J. PHILLIPS
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel
Federal Communications Commission

DOUGLAS N. LETTER
MARK B. STERN
BRUCE G. FORREST
Attorneys

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